Maung Min Aung & Anor v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEALS NO 41–69 OF 2000 AND 41–70 OF 2000
AUGUSTINE PAUL J
13 NOVEMBER 2000

Criminal Procedure *— Conviction — Validity of conviction — Conviction recorded after plea in mitigation and before sentencing, whether valid — Whether error in recording conviction is curable irregularity*

Criminal Procedure *— Plea of guilty — Joint plea — Charges not read to accused separately — Whether joint plea of guilty valid — Whether irregularity curable under s 422 Criminal Procedure Code*

The two accused persons were jointly charged with three offences under the Immigration Act 1959 and one under the Passport Act 1966. They pleaded guilty to the four charges against them. The magistrate had convicted both the accused persons after they had made their plea in mitigation and just prior to the imposition of sentence. The accused appealed against the sentence. When the appeal came up for hearing, counsel for the accused invited the court to exercise its powers of revision to review the convictions recorded by the magistrate on the grounds that: (i) a conviction refers to a finding of guilt and it must therefore be recorded upon acceptance of the plea of guilt and thus before the plea in mitigation was made; and (ii) the charges were not read to the accused persons individually.

Held, setting aside the convictions and sentences imposed upon both accused:

(1) A conviction must be recorded only after the court is satisfied that the sentence to be imposed warrants a conviction. The court can be so satisfied only after a plea in mitigation has been advanced in order to assess the sentence to be passed, ie whether the sentence is one that must carry with it a conviction. A conviction must therefore be recorded only after the plea in mitigation has been made and before sentence is passed (see pp 145I–146B).

(2) Any conviction recorded before a plea in mitigation has been made may render nugatory the application of s 173A of the Criminal Procedure Code which provides for certain orders to be made without recording a conviction. What has been raised in mitigation may warrant the making of such orders which would be hampered if a conviction has already been recorded (see p 147C).

(3) The procedure followed by the magistrate was correct in law. The objection raised was therefore without any merit. Further, an error in recording a conviction is an irregularity which is curable

unless the pre-mature recording precludes the imposition of a sentence without recording a conviction (see p 148B–C).

(4) The record of proceedings did not indicate that the charges against the two accused persons were read to them separately. On the contrary it indicated that the plea was a joint plea of guilty. The accused persons had therefore not pleaded guilty in accordance with law. These irregularities were not curable under s 422 of the Criminal Procedure Code. It follows that the convictions recorded against the two accused persons and the sentences imposed must be set aside (see p 148E–G).

[**Bahasa Malaysia summary**

Kedua-dua orang tertuduh telah dituduh bersesama atas tiga kesalahan di bawah Akta Imigrasi 1959 dan seorang di bawah Akta Paspot 1966. Mereka mengaku salah kepada semua empat tuduhan terhadap mereka. Majistret telah mensabitkan kedua-dua tertuduh setelah mereka membuat rayuan dalam mitigasi dan sebelum hukuman dijatuhkan. Tertuduh telah meminta peringanan terhadap hukuman. Apabila rayuan dihadapkan untuk perbicaraan, peguam bagi pihak tertuduh telah memohon mahkamah untuk menggunakan kuasa penyemakan untuk mengkaji semula sabitan-sabitan yang direkodkan oleh majistret atas alasan bahawa: (i) satu sabitan merujuk kepada penemuan akuan bersalah dan ia mestilah oleh demikian direkodkan atas penerimaan akuan bersalah dan justeru itu sebelum hujah meringankan hukuman dibuat; dan (ii) tuduhan-tuduhan tersebut tidak dibaca kepada tertuduh secara berasingan.

Diputuskan, mengetepikan sabitan dan hukuman yang dikenakan ke atas kedua-dua tertuduh:

(1) Satu sabitan mestilah direkodkan hanya selepas mahkamah berpuas hati bahawa hukuman yang dijatuhkan mewajarkan satu sabitan. Mahkamah akan berpuas hati hanya selepas satu hujah meringankan hukuman dikemukakan bagi tujuan menaksir hukuman yang akan dijatuhkan, iaitu sama ada hukuman tersebut adalah satu yang mesti beserta satu sabitan. Satu sabitan mestilah oleh itu direkodkan hanya selepas rayuan meringankan hukuman tersebut telah dibuat dan sebelum hukuman dijatuhkan (lihat ms 145I–146B).

(2) Apa-apa sabitan yang direkodkan sebelum satu hujah meringankan hukuman dibuat mungkin akan menyebabkan pemakaian s 173 Kanun Prosedur Jenayah tidak berguna yang memperuntukkan beberapa perintah tertentu yang boleh dibuat tanpa direkodkan satu sabitan. Apa yang ditimbulkan di dalam mitigasi mungkin mewajarkan perintah-perintah sedemikian dan pemberian perintah-perintah begini tidak akan dapat dilakukan jika satu sabitan telahpun direkodkan (lihat ms 147C).

(3) Prosedur yang diikuti oleh majistret adalah betul di sisi undang-undang. Bantahan yang ditimbulkan oleh demikian adalah tanpa apa-apa merit. Tambahan pula, satu kesilapan di dalam merekodkan satu sabitan adalah satu luar aturan yang boleh diperbetulkan kecuali jika rekod pra-masa tersebut menghalang satu hukuman dijatuhkan tanpa merekodkan satu sabitan (lihat ms 148B–C).

(4) Rekod prosiding tersebut tidak menunjukkan bahawa tuduhan-tuduhan terhadap dua orang tertuduh tersebut telah dibaca kepada mereka secara berasingan. Sebaliknya ia menunjukkan bahawa akuan tersebut adalah satu akuan bersalah bersesama. Tertuduh oleh demikian tidak membuat akuan bersalah menurut undang-undang. Luar aturan-luar aturan tersebut tidak boleh diperbetulkan di bawah s 422 Kanun Prosedur Jenayah. Seterusnya sabitan-sabitan yang telah direkodkan terhadap kedua-dua tertuduh dan hukuman-hukuman yang dikenakn hendaklah diketepikan (lihat ms 148E–G).]

Notes

For cases on validity of conviction, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1213–1218.

For cases on joint plea of guilty, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1976–1977.

Cases referred to

Abdul Kadir bin Abdul Rahman v PP [1984] 1 MLJ 80 (refd)
Chen Chong & Ors v PP [1967] 2 MLJ 130 (refd)
Chin Ban Keat v R [1949] MLJ 297 (refd)
Chota bin Abdul Razak v PP [1991] 3 MLJ 77 (refd)
Fong Siew Poh & Ors v PP [1933] 1 MC 155 (refd)
Griffiths v R (1977) 137 CLR 293 (refd)
Heng Kim Khoon v PP [1972] 1 MLJ 30 (refd)
Lian Kian Boon v PP [1991] 1 MLJ 51 (refd)
Lo Kim Peng & Ors v PP [1978] 1 MLJ 249 (refd)
Maxwell v R (1996) 135 ALR 1 (refd)
Mohammad bin Hassan v PP [1998] 5 MLJ 65 (refd)
PP v Abdul Aziz [1978] 2 MLJ 155 (refd)
PP v He King Kiok & Anor [1992] 2 MLJ 781 (refd)
PP v Ismail bin lbrahim [1998] 3 MLJ 243 (refd)
R v Boyle [1954] 2 All ER 721 (refd)
R v Tonks and Goss [1963] VR 121 (refd)
Richards v The Queen [1993] AC 217
S (An Infant) v Recorder of Manchester [1970] 2 WLR 21 (refd)
Sau Soon Kim v PP [1975] 2 MLJ 134 (refd)
Subramaniam & Anor v PP [1976] 1 MLJ 76 (refd)
Tukiran bin Taib v PP [1955] MLJ 24 (refd)

Legislation referred to

Criminal Procedure Code ss 173(b), (m)(ii), 173A, 422
Immigration Act 1959
Magistrate's Court Act 1952 [Eng]
Passports Act 1966

S Bala (*SBS Maniam Associates*) for the appellants.
Lukman bin Zainuddin (Attorney General's Chambers) for the respondent.

Augustine Paul J. : Maung Min Aung and Abdul Razak bin Kamaruddin, Myanmar nationals, were jointly charged in the Magistrate's Court at Kuala Lumpur on 30 May 2000 with three offences under the Immigration Act 1959 and one under the Passports Act 1966. They pleaded guilty to the four charges against them and were sentenced to seven years imprisonment and ordered to be given five strokes of the rotan each in respect of the first charge and three years imprisonment in respect of the second, third and fourth charges. They appealed against the sentences imposed.

When the appeal came up for hearing before me, learned counsel for the accused invited me to exercise my powers of revision to review the convictions recorded by the learned magistrate against the two accused persons as they were wrong in law. He said that the convictions had been recorded improperly and that the charges were not read to the accused persons individually. As the matters raised were of considerable importance, I agreed to review the convictions recorded.

Recording of the conviction

The learned magistrate had convicted both the accused persons after they had made their plea in mitigation and just prior to the imposition of sentence. This, according to learned counsel, was wrong in law as a conviction refers to a finding of guilt and it must therefore be recorded upon acceptance of the plea of guilt and thus, before the plea in mitigation is made.

In order to consider the validity of the objection raised by learned counsel, it is necessary to delve into the meaning of the word 'conviction'. The question of what constitutes a 'conviction' has been the subject matter of deliberation in several cases. It has been used with two different meanings. Lord Reid said in *S (An Infant) v Recorder of Manchester* [1970] 2 WLR 21 at p 25:

> Much of the difficulty has arisen from the fact that 'conviction' is commonly used with two different meanings. It often is used to mean final disposal of a case and it is not uncommon for it to be used as meaning a finding of guilt.

In *R v Tonks and Goss* [1963] VR 121 the full court of the Supreme Court of Victoria (Herring CJ and Sholl and Little JJ) reviewed the authorities and said at pp 127–128:

> The review of the authorities which we have made satisfied us that a plea of guilty does not of its own force constitute a conviction. In our opinion, it amounts to no more than a solemn confession of the ingredients of the crime alleged. A conviction is a determination of guilt, and a determination of guilt must be the act of the court or the arm of the court charged with deciding the guilt of the accused. It may be that even a determination of guilt will not in all cases amount to a 'conviction', for the latter term may be used in a particular context as meaning not merely conviction by verdict where no judgment is given, but conviction by judgment (vide *Burgess v Boetefeur* (1844) 7 Mann & G 481 and *Halte's Pleas of the Crown* Vol 1 at p 686) but there must at least be a determination of guilt before there can be a conviction. There can accordingly be no conviction on a count to which an accused pleads guilty until by some act on the part of the court it has indicated a determination of the question of guilt.

It is therefore clear that a plea of guilty does not of its own force constitute a conviction. It is a further act of the court that will result in one. Even then the word 'conviction' is used in two senses; one in a narrow sense and the other in a wider sense. In the narrower sense a conviction does not occur until there is an acceptance of the plea of guilty which will amount to a determination of guilt by the court (see *Griffiths v R* (1977) 137 CLR 293; *Maxwell v R* (1996) 135 ALR 1). The acceptance of the plea by the court amounts to a determination of guilt because it means that the court is satisfied that the accused has pleaded guilty to an offence known to law with full appreciation of the nature and consequences of the plea. In the case of a trial the determination of guilt will be the finding of guilt made at the end of the case. Where the word 'conviction' is used in this sense it will occur immediately upon acceptance of a plea of guilt or a finding of guilt by the court resulting in a conviction being recorded before the plea in mitigation has been made by the accused. But even a determination of guilt will not in all cases amount to a 'conviction'. Thus in its wider sense it refers to the final disposal of the case. This will occur after the plea in mitigation has been made and a conviction will accordingly be recorded just before sentence is passed. The proper sense in which the word must be construed in a particular case is dependent on the statutory context in which it is used. Where there is nothing in the context to suggest the narrower sense in which it is used then it must be interpreted to refer to its wider meaning. This was succinctly explained by Lord Bridge of Harwich in *Richards v The Queen* [1993] AC 217 at pp 222–223:

> It has been said many times that the word 'conviction' is ambiguous and it has sometimes been construed in a statutory context as referring to nothing more than a finding of guilt. But, in the absence of something in the context which suggests that narrower meaning, the authorities in the 19th century and earlier all seem to point to the conclusion that the requirement to establish a conviction requires a proof not only of the finding of guilt but also of the court's final adjudication by sentence or other order.

Thus it was held in *S (An Infant) v Recorder of Manchester* that s 13(3) of the Magistrate's Court Act 1952 which states that:

> If the accused pleads guilty, the court may convict him without hearing evidence …

A uses the word 'conviction' in the narrower sense of referring to only a finding of guilt. The requirement in that provision to convict following a guilty plea without there being any intermediate step of making a determination of guilt means that it is the conviction which is the act that decides the guilt of the accused. It therefore refers to the determination of guilt and not to the final disposal of the case.

B With that in mind I shall now consider the context in which the word 'convicted' has been used in s 173(b) and (m)(ii) of the Criminal Procedure Code ('s 173(b)' and 's 173(m)(ii)') in order to determine the sense in which it has been used therein. Section 173(b) deals with the procedure to be followed after a plea of guilt has been made, while s 173(m)(ii) deals with C the procedure to be followed after a finding of guilt. Both the provisions read as follows:

> The following procedure shall be observed by Magistrates in summary trials:
>
> (b) If the accused pleads guilty to the charge, whether as originally framed or as amended, the plea shall be recorded and he may be convicted on it and D the court shall pass sentence according to law: Provided that before a plea of guilty is recorded the court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him.
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> (m)(ii) If the court finds that the prosecution has proved its case beyond reasonable doubt, the court shall find the accused guilty and he may be E convicted on it and the court shall pass sentence according to law.

Pursuant to s 173(m)(ii), the order that must be made at the end of the trial before sentence is imposed, is a finding of guilt followed by a conviction on it, if found necessary. It is mandatory for the court to make a finding of guilt as indicated by the word 'shall' in the phrase '… the court shall find the F accused guilty …' while the recording of a conviction is discretionary as indicated by the word 'may' in the phrase '… and he may be convicted on it …' in s 173(m)(ii). The meaning of the word 'convicted' in s 173(m)(ii) depends on whether it refers to a determination of guilt or the final disposal of the case. As I said earlier a finding of guilt is a determination of guilt and G is capable of amounting to a 'conviction' on its own within the meaning of the narrower sense in which the word is used. In order to fall within this meaning the word 'convicted' in s 173(m)(ii) must refer to a determination of guilt. However, the fact that the court shall find the accused guilty at the end of the trial '… and he may be convicted on it …' as provided by s 173(m)(ii) means that the recording of a conviction is a separate and H distinct exercise after a finding of guilt has already been made. The fact that the power to convict is not automatic following a finding of guilt, by virtue of it being discretionary, supports this view. The discretionary power to convict means that the recording of a conviction must be postponed after a finding of guilt has been made. It is postponed to enable the court to decide whether in fact a conviction must be recorded before imposing sentence. I That will bring into focus s 173A of the Criminal Procedure Code under which an order is made without recording a conviction. Thus a conviction must be recorded only after the court is satisfied that the sentence to be

imposed warrants a conviction. The court can be so satisfied only after a plea in mitigation has been advanced in order to assess the sentence to be passed, that is to say, whether the sentence is one that must carry with it a conviction. The corollary is that a conviction cannot be recorded at the stage a finding of guilt is made. The word 'convicted' in s 173(m)(ii) thus refers to the wider sense of the meaning of the word 'conviction' in which it is used which is the stage of the final disposal of the case. A conviction must therefore be recorded only after the plea in mitigation has been made and before sentence is passed. In cases falling within s 173(b) the first order to be made by the court following a plea of guilt is the recording of the plea. The proviso to s 173(b) ('the proviso') explains the steps to be taken before recording a plea of guilty. It must be observed that the record made of the accused pleading guilty when the charge is read and explained to him is not the recording of the plea as envisaged by the proviso. It is only the first step or the commencement of the recording of the plea to enable the court to proceed further so as to ensure that the plea made amounts to a plea of guilty in law in accordance with the requirements of the proviso. The proviso requires the court to ascertain:

(a) that the accused understands the nature and consequences of his plea; and

(b) that he intends to admit, without qualification, the offence alleged against him.

The recording of the plea is therefore done in two further stages after the initial record has been made of the accused pleading guilty. The first stage consists of the court ascertaining that the accused understands the nature and consequences of the plea after they have been explained to him. This is done immediately when he pleads guilty. This stage of the recording of the plea is signified by the court's record stating that the accused understands the nature and consequences of his plea. The second stage consists of the admission, without qualification, of the offence by the accused. In order to make such an admission the accused must know the nature of the offence alleged against him. He would only be able to do so if the facts that constitute the offence have been placed on record. Thus the prosecution must set out an outline of the facts of the case (see *PP v He King Kiok & Anor* [1992] 2 MLJ 781; *Chota bin Abdul Razak v PP* [1991] 3 MLJ 77; *Mohammad bin Hassan v PP* [1998] 5 MLJ 65). The facts given should be confined to matters which the prosecution is able to prove and which are necessary to establish the charge (see *Chen Chong & Ors v PP* [1967] 2 MLJ 130; *Abdul Kadir bin Abdul Rahman v PP* [1984] 1 MLJ 80). The facts enable the court to satisfy itself that they constitute the offence to which the accused has pleaded guilty (see *Tukiran bin Taib v PP* [1955] MLJ 24; *Chin Ban Keat v R* [1949] MLJ 297; *PP v Ismail bin lbrahim* [1998] 3 MLJ 243). The requirement of the accused's admission of the offence alleged against him is satisfied by him admitting the facts that have been given. The court then accepts the guilty plea after the accused has admitted the facts (see *PP v Abdul Aziz* [1978] 2 MLJ 155; *Lian Kian Boon v PP* [1991] 1 MLJ 51). The court is not bound to accept a plea of guilty in all

cases (see *Heng Kim Khoon v PP* [1972] 1 MLJ 30). The plea should not be accepted by the court where on the facts admitted an accused person could not in law have been guilty of an offence (see *Sau Soon Kim v PP* [1975] 2 MLJ 134; *Lo Kim Peng & Ors v PP* [1978] 1 MLJ 249). The recording of the plea at this stage is therefore signified by the admission of the facts by the accused and the acceptance of the plea by the court. Thus the recording of the plea as required by the proviso is complete only when the court has accepted the plea of guilty. It amounts to a determination of guilt. This, on its own, is capable of amounting to a conviction. However, just as in the case of s 173(m)(ii), the recording of a conviction pursuant to s 173(b) is a separate exercise after the plea has been recorded. The meaning of the word 'convicted' in s 173(b) is therefore the same as in s 173(m)(ii). This interpretation of both the provisions is logical as any conviction recorded before a plea in mitigation has been made may render nugatory the application of s 173A of the Criminal Procedure Code which provides for certain orders to be made without recording a conviction. What has been raised in mitigation may warrant the making of such orders which would be hampered if a conviction has already been recorded.

The procedure to be followed where there is a plea of guilt or a finding of guilt can thus be summarised as follows:

Section 173(b)

(1) Charge must be read and explained to accused. Court must ensure that accused understands the charge.

(2) Accused pleads guilty.

(3) Recording of plea to commence.

(4) Court must ensure that accused understands nature and consequences of his plea. First stage in recording plea.

(5) Facts of the case to be recorded.

(6) Court must ascertain that facts make out the offence.

(7) Court must ascertain whether accused admits the facts.

(8) If accused denies the facts plea to be rejected and case to be fixed for trial.

(9) If accused admits facts plea to be accepted. Second stage in recording plea.

(10) Plea in mitigation.

(11) Recording of conviction (No recording of conviction if order to be made is one under s 173A Criminal Procedure Code).

(12) Sentence.

Section 173(m)(ii)

(1) Charge must be read and explained to accused. Court must ensure that accused understands charge.

(2) Accused claims trial.

(3) Trial.

(4) Finding of guilt.

(5) Plea in mitigation.

(6) Recording of conviction (no recording of conviction if order to be made is one under s 173A Criminal Procedure Code).

(7) Sentence.

I am therefore of the view that the procedure followed by the learned magistrate is correct in law. The objection raised is thus without any merit. I pause to add that any error in recording a conviction is an irregularity which is curable, unless the pre-mature recording precludes the imposition of a sentence without recording a conviction.

Taking of the plea

Learned counsel contended that the record of proceedings does not disclose that the charges were read to both the accused persons separately. The relevant part of the notes of evidence of the learned magistrate merely reads as follows:

> OKT: PBTF MS TSAP.

This note does not indicate that the charges against the two accused persons were read to them separately. On the contrary it indicates that the plea was a joint plea of guilty. In *Fong Siew Poh & Ors v PP* [1933] 1 MC 155, it was held that a conviction based on a joint plea of guilty by two or more accused persons is bad and irregular. The note also does not show that the plea was taken in respect of the four charges separately. In *R v Boyle* [1954] 2 All ER 721 it was held that where there are two or more charges against an accused person the charges should be read out and explained to him separately and the plea must be recorded separately on each charge. The accused persons have therefore not pleaded guilty in accordance with law. These irregularities are not curable under s 422 of the Criminal Procedure Code (see *Subramaniam & Anor v PP* [1976] 1 MLJ 76). It follows that the convictions recorded against the two accused persons and the sentences imposed must be set aside.

In the exercise of my powers of revision, I set aside the convictions and sentences imposed upon the two accused persons and ordered that they be retried.

Convictions and sentences set aside.

Reported by Jafisah Jaafar